FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

August 22, 2001

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. LAKE 2001-154-M
CARRI SCHARF MATERIALS, COMPANY	:	

BEFORE: Verheggen, Chairman; Jordan, Riley, and Beatty, Commissioners

ORDER

BY: Jordan and Beatty, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On April 25, 2001, the Commission received from Carri Scharf Materials, Company ("Carri Scharf") a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator has 30 days following receipt of the Secretary of Labor's proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

In this case, Carri Scharf did not timely submit its request for a hearing to the Department of Labor's Mine Safety and Health Administration ("MSHA"). *See* 29 C.F.R. § 2700.26. In its pro se motion, it contends that it never received the proposed penalty assessment (Control No.

11-03013-05509) from MSHA.[1] *Id.* Carri Scharf also challenges the merits of one of the orders associated with the proposed penalty assessment (Order No. 7827502), stating that the information contained in the order is not accurate, and that there is new information pertaining to the case. It asserts that the civil penalty amount of $7259 is absurd and that another proposed penalty assessment (Control No. 11-03013-05508), for the amount of $1600, was issued to it and pertains to the present case. *Id.* Carri Scharf requests that the Commission reopen this matter. *Id.*

We have held that, in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In reopening final orders, the Commission has found guidance in, and has applied "so far as practicable," Fed. R. Civ. P. 60(b). *See* 29 C.F.R. § 2700.1(b) ("the Commission and its judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. In accordance with Rule 60(b)(1), we previously have afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Gen. Chem. Corp.,* 18 FMSHRC 704, 705 (May 1996); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997).

[1] Carri Scharf attached to its motion a copy of a certified mail receipt showing that the proposed penalty assessment was sent by MSHA to Carri Scharf's P.O. box address but was returned to the agency undelivered. Mot., attachment.

On the basis of the present record, we are unable to evaluate the merits of Carri Scharf's position. In the interest of justice, we remand the matter for assignment to a judge to determine whether relief from the final order is appropriate. *See Idaho Minerals*, 22 FMSHRC 1301, 1301-03 (Nov. 2000) (remanding where operator alleged it did not receive proposed penalty assessment); *Bauman Landscape, Inc.*, 22 FMSHRC 289, 289-90 (Mar. 2000) (same). If the judge determines that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Mary Lu Jordan, Commissioner

Robert H. Beatty, Jr., Commissioner

Chairman Verheggen and Commissioner Riley, concurring in result:

We would grant the operator's request for relief here, because the Secretary does not oppose the motion for relief, the operator has offered a sufficient explanation for its failure to timely respond, and no other circumstances exist that would render such a grant problematic. However, in order to avoid the effect of an evenly divided decision, we join in remanding the case to allow the judge to consider whether the operator has met the criteria for relief under Rule 60(b). *See Pa. Elec. Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992) (providing that the effect of a split Commission decision is to leave standing disposition from which appeal has been sought).

Theodore F. Verheggen, Chairman

James C. Riley, Commissioner

Distribution

Joseph A. Scharf
Carri Scharf Materials Company
P.O. Box 305
Bloomington, IL 61702

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Boulevard, Suite 400
Arlington, VA 22203

Chief Administrative Law Judge David F. Barbour
Federal Mine Safety and Health Review Commission
1730 K Street N.W., Suite 600
Washington, D.C. 20006